Service of the within *Brief for Respondent, State of North Carolina* and receipt of a copy thereof is hereby admitted this the _____ day of March, A.D. 1976.

by: _____

on behalf of: _____

IN THE

Supreme Court of the United States

TERM, 1975

No. 75-5491

JAMES TYRONE WOODSON AND LUBY WAXTON,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Preamble of the Constitution of the United States which provides:

> We the people . . . in order to . . . establish justice, insure domestic tranquility . . . promote the general welfare . . . do ordain and establish this Constitution . . . .

Article IV, Section 4 of the Constitution of the United States which provides:

> The United States shall guarantee to every state in this Union a Republican form of government . . . .

Article V of the Constitution of the United States which provides:

> . . . (A)mendments, . . . shall be valid to all intents and purposes, as part of this Constitution . . . .

The Fifth Amendment to the Constitution of the United States which provides:

> No person shall be held to answer for a capital . . .crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property without due process of law; . . . .

The Sixth Amendment to the Constitution of the United States which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . . .

The Eighth Amendment to the Constitution of the United States which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Tenth Amendment to the Constitution of the United States which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment to the Constitution of the United States which provides:

> . . . (N)or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

Article I, Section 1 of the Constitution of North Carolina which provides:

> . . .(A)ll persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life (and) liberty . . . .

Article I, Section 18 of the Constitution of North Carolina which provides:

> All Courts shall be open to every person for an injury done him in his . . . person . . . and shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Article I, Section 19 of the Constitution of North Carolina which provides:

> No person shall be taken, imprisoned, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Article I, Section 22 of the Constitution of North Carolina which provides:

> . . .(N)o person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, . . . waive indictment in noncapital cases.

Article I, Section 24 of the Constitution of North Carolina, which provides:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . .

Article I, Section 27 of the Constitution of North Carolina which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Article III, Section 5(6) of the North Carolina Constitution, which provides:

> The Governor may grant reprieves, commutations, and pardons after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper . . . .

Article IV, Section 18(1) of the North Carolina Constitution, which provides:

> . . .(A) District Attorney shall be chosen for a term of four years by the qualified voters . . . . The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district . . . .

Article XI, Section 1 of the North Carolina Constitution, which provides:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold . . . any office . . . .

Article XI, Section 2 of the North Carolina Constitution which provides:

> . . .(M)urder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

North Carolina General Statute Section 9-14 which provides:

> Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues . . . and render true verdicts according to the evidence . . . .

North Carolina General Statute Section 11-1 which provides:

> Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity.

North Carolina General Statute Section 11-2, which provides:

> Judges . . . and other persons who may be empowered to administer oaths, shall . . . require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head.

North Carolina General Statute Section 11-6, which provides:

> *Oath to support Constitution of United States; all officers take.*–All members of the General Assembly, and all officers who shall be elected

or appointed to any office of trust or profit within the State, shall, agreeably to act of Congress, take the following oath or affirmation: *'I, A.B., do solemnly swear that I will support the Constitution of the United States; so help me, God.'*; which oath shall be taken before they enter upon the execution of the duties of the office.

North Carolina General Statute Section 11-7, which provides:

> *Oath or affirmation to support State Constitution; all officers to take.*–Every . . . person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation: *'I, A.B., do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.'*

North Carolina General Statute Section 11-11 which provides:

> The oath of office to be taken by . . . solicitors . . . (is) . . . "I . . . swear . . . I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God."

North Carolina General Statute Section 14-230, which provides:

> *Willfully failing to discharge duties.* If any . . . official of any State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court.

North Carolina General Statute Section 14-17, which provides:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death . . . .

North Carolina General Statute Section 15-187, which provides:

> Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

North Carolina General Statute Section 15-188, which provides:

> The mode of executing a death sentence must in every case be by causing the convict or felon

to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; . . . .

QUESTIONS PRESENTED

I

IS CAPITAL PUNISHMENT, IN AND OF ITSELF, CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II

DOES THE MERE EXISTENCE OF THE AUTHORITY IN THE PROSECUTOR, JURY, JUDGE AND GOVERNOR TO MAKE HUMAN JUDGMENTS IN GOOD FAITH AND ACCORDING TO LAW AND THEIR OATHS OF OFFICE BRING THE NORTH CAROLINA MANDATORY DEATH PENALTY FOR FIRST DEGREE MURDER WITHIN THE PROSCRIPTIONS OF THE *FURMAN* DECISION?[1]

STATEMENT OF THE CASE

Petitioners James Tyrone Woodson and Luby Waxton, tried in Superior Court of Harnett County before the Honorable Henry McKinnon, judge presiding and a jury, were found guilty of the first degree murder of Mrs. Shirley Whittington Butler. They were sentenced to death as required by statute, N. C. Gen. Stat. §14-17. Mrs. Butler was killed on June 3, 1974, during an armed robbery of a convenience market which she

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[1] Petitioner states the two questions as a single question. However, careful analysis of the argument presented by petitioner reveals there are two separate and distinct questions raised. They are delineated and defined herein. Both are narrow legal questions involving per se rules of law, and do not involve factual questions or" as applied" principles of law. Respondent has addressed itself to both questions presented in Petitioner's brief and it may well be desirable for the Court to give a definitive answer to both.

operated. Petitioners' trial began on December 3, 1974 and resulted in their conviction and sentencing on December 9, 1974.

The State's direct evidence against petitioners consisted primarily of the testimony of two co-defendants, Leonard Maurice Tucker (hereinafter, "Tucker") and Johnnie Lee Carroll (hereinafter, "Carroll"). Tucker's and Carroll's testimony was substantially the same. The witness Tucker testified as follows: He and Petitioner Woodson had been together on June 3, 1974, drinking wine and had been discussing a robbery with Carroll and petitioner Waxton for the past few days (R. 39).[2]

Waxton came to Tucker's trailer about 9:30 p.m., asked where Woodson was and told Tucker to come with him (R. 39,43). Tucker followed Waxton to Woodson's trailer. Tucker testified that Waxton hit Woodson in the face, told him that he was going to go along with them and threatened him (R. 39). Woodson joined them.

The three men went to Waxton's trailer where they met Carroll (R. 39,45), who had borrowed his brother's car for the evening (R. 45). Woodson told Carroll that Waxton hit him because he, Woodson, was drunk (R. 39,43,45). Inside the trailer, Waxton took a nickel-plated derringer pistol from a cabinet and put it in his pocket (R. 39). Tucker took a .22 caliber automatic rifle from the couch (R. 39,43). Woodson took the rifle out of Tucker's hands and sat in the car with the rifle in his hands, according to Carroll's testimony (R. 45). Tucker testified: "Luby (Waxton) was giving all the orders" (R. 43). Carroll testified: "(w)hen Woodson took the gun from Tucker, he (Woodson) said he was going to show him that he wasn't drunk" (R. 47).

The four men got into Carroll's brother's car; Carroll drove, Woodson sat beside him on the front seat with the rifle; Waxton and Tucker sat in the back seat (R. 39). Waxton said they were going to rob the E-Z Shop, but when they arrived

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2 The reference "R." is used to designate the printed record in the Supreme Court of North Carolina.

they found customers present and drove on past the store (R. 39). They stopped the car briefly while Woodson test-fired the rifle by shooting it into the ground twice (R. 39-40,43,45,47).

They then returned and parked near the E-Z Shop where they could see approaches to the store. "Up until the last minute Waxton had instructed Woodson to go in but changed his mind" (R. 44). Tucker accompanied Waxton into the store while Carroll, the driver, and Woodson remained in the car beside the store with the rifle in the front seat (R. 40).

Waxton told Woodson "not to let anybody in the store" (R. 40). "It was his (Woodson's) duty to cover the front door" (R. 43). Inside the store, Tucker and Waxton in turn asked Mrs. Butler, the victim, for cigarettes. After Tucker paid Mrs. Butler, she handed the requested cigarettes to Waxton who "then reached into his back pocket, pulled out the Derringer, stuck it around or about the left side of her neck and fired one shot" (R. 40). Waxton then gave the money tray from the cash register to Tucker who took it out of the store (R. 40). As Tucker walked out, he passed R.N. Stancil (R. 40), who was entering, and "told him to look out" and kept walking toward the car. Woodson had seen Stancil but had not stopped him. Woodson got out of the car with the rifle as Stancil approached, but Carroll pulled him back in the car (R. 48). Tucker then heard a second shot from inside the store, got in the car and about a couple of minutes after the second shot "Luby came out of the store walking fast with some paper money in his hand" (R. 40,45).

As they drove with the money to Waxton's mother's house, Waxton told Tucker that "he shot the man in the back" in the store (R. 40).

At the house, Tucker and Waxton counted the money in the bathroom: "(t)here was about $280 and Luby (Waxton) kept it" (R. 40). On June 4 after some conversation with Tucker about going with them (R. 41), Waxton and Woodson flew to Newark, New Jersey, where they were subsequently apprehended (R. 102-103).

On cross-examination, Tucker admitted that he had pleaded guilty to lesser charges "in an attempt to save myself"

(R. 42). "I was told that I would have to testify against Luby Waxton and I agreed to do that in return for the State Attorney to accept a lesser plea." Tucker stated that he "was afraid of Waxton" (R. 43), but added that "Waxton didn't threaten any of us" (R. 44) to force their participation in the robbery. Likewise, Carroll testified that "(i)t is true that I have made a trade to save my own life...I agreed to come up here and testify in order to save my own neck" (R. 47). He added that Woodson "and Tucker went willingly and did whatever they did willingly", and that he himself "participated in the crimes on my own, Luby did not make me" (R. 48).

After the State rested its case (R. 57), a hearing was held in the absence of the jury at which petitioner Waxton tendered a guilty plea to charges of armed robbery and accessory after the fact to murder; the same charges to which Tucker had been permitted to plead (R. 83-85). There is some indication that the District Attorney had expected a plea before trial from petitioner Woodson, but Woodson *never* tendered a guilty plea either before or during the trial (R. 70-71).

Petitioner Waxton was examined by the trial court concerning his comprehension of the tender, the possible penalty and his desire to enter pleas of guilty (R. 86). The District Attorney inquired into the terms of the plea proposed by Waxton, and in answer to the Court's inquiries to his position stated: "I cannot accept the pleas". The trial judge made no further inquiry or comment, did not act to accept the pleas of Waxton, and the trial continued (R. 87).

Both defendants offered evidence.

Petitioner Waxton testified in his defense, giving an account of the robbery that was basically similar to the accounts given by Tucker and Carroll, but explained that he had punched Woodson in the eye because of an unpaid debt (R. 88-89). Waxton also testified, *contrary to the testimony of Tucker* (R. 39-40), *Carroll* (R. 45-46), *and Woodson* (R. 101), that he had not had a pistol; that he had never owned a handgun; that he did not have a Derringer that night; that Tucker had a gun in his pocket; that Tucker shot both Mrs. Butler and Mr. Stancil, and that he (Waxton) had left the store before Tucker (R. 89-90). Waxton's testimony was basically

the same as his co-defendants' except that he gave Tucker responsibility for shooting Mrs. Butler and Stancil.

Waxton further testified that the robbery had been planned in the trailer park and that all four, including petitioner Woodson, Tucker and Carroll participated in planning the robbery (R. 94-95).

Petitioner Waxton denied forcing anyone to participate in the robbery (R. 89,92-93) and testified that the four of them, including petitioner Woodson, divided the proceeds of the robbery equally (R. 93).

Petitioner Woodson also testified. He told of a drug addiction problem in Newark, New Jersey, before his coming to North Carolina with Waxton (R. 98-99). Woodson testified that Waxton had mentioned a robbery; but that while he had never said anything to Waxton, he had told Tucker he did not want to participate (R. 99).

Woodson testified that Waxton came to his trailer, hit him for being drunk and threatened him (R. 100). Woodson testified that "(n)o one forced me in the car" (R. 100).

Woodson then admitted he took the rifle from Tucker (R. 103), and entered the car with the rifle by his side (R. 107). He did not recall any test-firing of the rifle.

Woodson testified that he heard one shot before Tucker came out, that he saw Mr. Stancil enter the store but made no effort to stop him, and then heard another shot, after which Waxton rushed out with paper money in his hand (R. 101). There was no division of the money; but he saw Waxton give his mother "something that was sparkling" (R. 101). Later that night, when Woodson and Waxton were alone when Woodson mentioned the woman victim, Waxton hit him and said he did not want to hear any more about what happened (R. 101-102). Petitioner Woodson introduced his statement to the police given on June 16, 1974 (R. 108-114).

The trial court instructed the jury that it could find petitioners guilty or not guilty of first degree murder of Mrs. Butler (R. 142-143-145) and guilty or not guilty of armed

robbery of Mrs. Butler (R. 143-144,145-146), and that it could find petitioner Waxton guilty of assault with a deadly weapon with intent to kill Mr. Stancil (R. 144), or guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury to Mr. Stancil (R. 144-145), or not guilty of either assault.

On the State's theory that petitioner Woodson was an aider and abettor in the robbery, the court instructed the jury that "you cannot find Tyrone Woodson guilty of an offense unless you have also found Luby Waxton guilty of that offense, the same offense" (R. 145). The court further charged that the jury might find petitioner Woodson not guilty of any offense if it found that he had committed otherwise criminal acts under coercion and duress (R. 139). The court instructed the jury that first degree murder "is punishable by death" (R. 120).

The jury found both petitioners guilty of first degree murder and armed robbery (R. 147-148,149), and it found petitioner Waxton guilty of assault with a deadly weapon with intent to kill (R. 150). Petitioners were sentenced to death upon the murder convictions as required by statute (R. 148-149,154-155). The court allowed petitioners' motions in arrest of judgment in the robbery case because the robbery was merged into the first degree murder verdict (R. 153-154). On June 26, 1975, the Supreme Court of North Carolina affirmed those convictions and petitioners' death sentences.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioners' pretrial motions to quash and dismiss the indictments charging them with murder on the ground that "G.S. 14-17 as presently written violates the Eighth and Fourteenth Amendments to the Constitution of the United States" because it requires the death penalty for first degree murder were denied (R. 19-20,25,35). Post-judgment motions by petitioners to arrest judgment and to set aside the verdict in the murder cases on the Eighth Amendment basis were denied (R. 151-152,153). These rulings were assigned by petitioners as error on appeal (R. 160-164), and the Supreme Court of North Carolina unanimously rejected petitioners'

claims in an opinion by Chief Justice Sharp and a concurring opinion by Justice Exum, *State v. Woodson & Waxton*, 287 N.C. 578, 215 S.E. 2d 607, 615 (1975).

Not presented for review in these two cases is the question of denial of equal protection of the law within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Thus Respondent will not discuss principles set forth in this clause and cases decided thereunder.

Again, as in *Fowler*, Petitioners raise only narrow questions of law involving *per se* principles of law, i. e., does capital punishment as required by North Carolina Statute contravene either the cruel and unusual punishment clause of the Eighth or the due process clause of the Fourteenth Amendment. Thus, in disposition of these cases, both Petitioners and Respondent assume proper police investigation, indictments, arraignments, presence of competent counsel at each crucial stage of the proceedings, competency and constitutional acquisition of the evidence admitted; sufficiency of the evidence to support the verdicts, proper and constitutional allocation of burden of proof, proper and constitutional selection of the petit jury, proper and constitutional jury instructions under extant law, proper and constitutional procedures for taking and entry of verdicts, proper and constitutional procedures for entry and docketing of the judgments, and proper and constitutional procedures for state court appellate review.

SUMMARY OF ARGUMENT

The General Assembly of North Carolina, acting in response to this Court's decision in *Furman v. Georgia*, amended N.C. Gen. Stat. §14-17 to remove all discretion in setting punishment, and to make death the mandatory punishment for first degree murder and first degree rape, N.C. Gen. Stat. § 14-17, §14-21.

In amending the statute, the elected General Assembly reaffirmed the will of the people to punish certain statutorily described crimes by death, without any post-verdict sentencing discretion in either the judge or the jury. The punishment upon conviction is truly mandatory; neither the judge nor jury have

any discretion as to the choice of life imprisonment or death as punishment.

Inherent in the criminal justice system are numerous judgments required by law to be exercised by sworn officials in good faith. The good faith judgments made by the prosecutor, the grand jury, the trial judge and the petit jury in the trial of a criminal case before sentencing and the decision by the Governor as to whether to commute, reprieve or pardon are not the type of discretion addressed by *Furman v. Georgia*. The existence of the authority in these public officials, acting in good faith and according to law, does not in and of itself bring the death penalty within the prohibition of the Eighth Amendment.

Capital punishment *per se* is not proscribed by the "cruel and unusual punishment" clause of the Eighth Amendment. Further, the imposition of the death penalty as provided for by North Carolina statutes does not constitute "cruel and unusual punishment" in the context of the Eighth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment.

The relative ease of legislative change and correction of errors, when compared to the finality and irreversibility of a judicially imposed constitutional prohibition, dictates, in an area of law in which so little of petitioners' argument is susceptible to proof, that legislative change is the only realistic and viable course for the development of our law to pursue.

Public acceptance, manifested through jury verdicts, public opinion polls, initiatives and referenda, and legislative reenactments belies the moral unacceptability and general public abhorrence of the death penalty asserted by petitioners.

The strong pressure of the constitutional doctrines of separation and balance of powers, as between the State and national governments, and as between the judiciary and the legislative branches, the doctrine of judicial restraint and the doctrine of *stare decisis* all require that petitioners' claims for judicial relief in these cases go unfulfilled.

ARGUMENT

I

INTRODUCTION

The General Assembly of North Carolina, in response to *Furman v. Georgia*, 408 U.S. 238 (1972) from this Court and *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), from the Supreme Court of North Carolina, after extensive debate enacted Chapter 1201 of the 1974 Session Laws, which modified the death penalty by limiting its application to first degree murder and first degree rape (formerly applicable to first degree murder, all rape, arson and first degree burglary) and by mandating the sentence of death in all convictions for first degree murder and first degree rape.[3]

This legislative action reaffirmed the public support for the death penalty for premeditated first degree murder and the felony-murder first degree murder.

Respondent agrees with Petitioners' observation that the amended first degree murder statute and the State Supreme Court's decision in *Waddell* has the same operative effect and does not merit extensive discussion. (Petitioners' Brief at 26).

Respondent will not burden the Court with a restatement of its positions set forth in its *Fowler* brief, but like Petitioners, we merely note that insofar as it is applicable to the instant cases, we ask that it be incorporated by reference into Respondent's brief here.

The underlying purpose of the statutory reenactment removing from the judge and jury all sentencing discretion and imposing death for a diminished category of offenses was to assure that for the most heinous crimes in North Carolina the

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3 The April 8, 1974, enactment of Chapter 1201 of the 1974 Session Laws was prospectively effective. By 1975 Session Laws, Chapter 749, Section 2 of Chapter 1201 of the 1974 Session Laws was made to apply to rapes committed after January 18, 1973 (the date of the *Waddell* decision) and before April 8, 1974.

death penalty would be imposed and that by removing *all* sentencing discretion there could be no successful *Furman* based attack on the North Carolina statute.

Respondent urges the attention of the Court to the briefs of the State of North Carolina, and its supporting *amici*, particularly the State of Utah at 3-7; the State of California at 15-22, the United States at 15-29 in *Fowler v. North Carolina*, No.73-7031 (O.T. 1974) for statements concerning the history and understanding of the origins of the Eighth Amendment ban on cruel and unusual punishment and the related guarantees of the Bill of Rights on which Respondent has relied and still relies in support of its contentions. Petitioners, by reference to the *Fowler* submission, also incorporate an Eighth Amendment history, Petitioners' *Fowler* brief at 26-39. The historical testimony of the period from 1688 to the present is but one, albeit an important, consideration in this Court's judgment in this case. Two facts in the historical discussion merit particular attention. First, Petitioners' history answers as much to Respondent's cause as do the historical discussions by Respondent and its *amici*. In their extended discussion of the Titus Oates case as a part of the understanding of the prohibition of cruel and unusual punishment (Pet. Brief at 28-34) the Petitioner remarks at 31:

> This punishment was harsh, discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II . . . *by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.* (Emphasis added.)

On that judgment Respondent fares well, for these death sentences are indisputably authorized by statute and handed down by courts of competent jurisdiction at the conclusion of a procedure which has undergone continuous improvement for the past two centuries and more.

Second, in all of petitioners' voluminous submissions in this case and in *Fowler*, there is scant discussion of the plain language of the Fifth and Fourteenth Amendments, which plainly contemplate capital punishment and provide for it. This omission is telling.

II

CAPITAL PUNISHMENT IS HISTORICALLY A CONSTITUTIONALLY ACCEPTABLE PUNISHMENT AS REFLECTED IN THE COMMON LAW OF ENGLAND, ITS INCORPORATION IN PLAIN LANGUAGE INTO THE CONSTITUTION OF THE UNITED STATES, AND THE DECISIONS OF AMERICAN COURTS SINCE RATIFICATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(a) The plain language of the Constitution and its Amendments make it clear that capital punishment was not intended to be forbidden.

The Constitution was not adopted in a historical vacuum as a set of abstract principles. Indeed, the Revolution had been fought in order that the Framers might guarantee to themselves and their posterity those hereditary rights of English people which the King would not guarantee to mere colonists. The Declaration of Independence makes this clear. The Constitution and Bill of Rights then were superimposed on a criminal justice system which knew well the penalty of death, and assumed it was valid. In the Constitution they provided for its imposition by Congress and the States.

The Eighth Amendment and the Fifth Amendment, both proposed by the First Congress, March 4, 1789, and ratified December 15, 1791, are part of the same Act. Nothing in the debates on The Bill of Rights indicates that the Framers believed that the Eighth Amendment prohibited the imposition and carrying out of sentences of death if due process were observed in arriving at such judgments. The language of the Amendment so provides.

Execution as a form of punishment is expressly recognized by various provisions of the United States Constitution. There were in the original Constitution indirect allusions to capital punishment. For example, in the Preamble, the Constitution's objectives include "To establish justice,

insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." In Article II, section 2, the President is given the power to grant reprieves. "Reprieve" ordinarily means the withdrawal of the sentence of death. Article III, Section 3 grants Congress the power to declare the punishment for treason; the punishment then and in most jurisdictions today is death.

The Fifth Amendment, adopted simultaneously with the Eighth, contains three references to the death penalty, and the Fourteenth Amendment provides that "no State shall deprive any person of *life*, liberty or property without due process of law . . . " The Fifth Amendment is an express mandate that "no person shall be held to answer for a *capital*, or other infamous crime, unless on a presentment or indictment of the Grand Jury." (Emphasis added.) It further requires that no person "be twice put in jeopardy of *life*", nor deprived of "*life*, liberty or property without due process of law" (Emphasis added). The same general language was included in the Fourteenth Amendement and made applicable to the States thereby in 1868.

> (b) The decisions of this Court have in unbroken line upheld or assumed the constitutionality of the death penalty.

The case law development has consistently recognized the constitutionality of capital punishment for over a hundred and eighty years. Even *Furman v. Georgia*, 408 U.S. 238 (1972) does not dispute the permissibility of capital punishment *under appropriate conditions*. Of the five concurring opinions, two expressly declined to face the question of whether capital punishment was *per se* a violation of the cruel and unusual punishments clause of the Eighth Amendment. In all previous decisons of this Court, the reasoning and results have consistently assumed the permissibility of the death penalty for extreme cases, or have squarely held that the death penalty is, for certain types of cases, a permissible punishment.

The first case in which this Court considered the Constitutional prohibition against cruel and unusual punishment was *Wilkerson v. Utah*, 99 U.S. 130 (1878). There

the Court addressed the mode of execution, by shooting, and held it was not forbidden by the prohibition against cruel and unusual punishment. The opinion focused primarily on the applicability of the "cruel and unusual punishment" provision to punishments involving torture and others of unnecessary cruelty.

With the advent of electrocution as a means of carrying out the death penalty, this Court in *In Re Kemmler*, 136 U.S. 436 (1890) denied an application for a writ of habeas corpus on the basis that the Eighth Amendment did not apply to state legislation. Of current importance, however, is the comment:

> punishments are cruel if they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there, something inhumane and barbarous, something more than the mere extinguishment of life.

In the early twentieth century in *Weems v. United States*, 217 U.S. 349 (1909) this Court overturned as cruel and unusual, a punishment known as "cadena temporal". It was a traditional Philippine punishment for even petty offenses that imposed fifteen years "hard and painful labor", the constant wearing of chains, loss of all civil rights, perpetual surveillance, and a severe fine. The case arose under the Phillippine Bill of Rights. The Court set the punishment aside because the punishment was strange and not native to this country, had never been an accepted punishment for crimes here, and was, by all American standards, patently harsh and disproportionate to the offense (falsification of a public document).

Following World War II in *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1946) the Court considered whether a second attempt at electrocution of a condemned murderer following a malfunction of equipment constituted cruel and unusual punishment. The Court there rejected the claim of unconstitutional punishment. Mr. Justice Reed in announcing the Court's opinion, concluded that modern Anglo-American law forbade the infliction of unnecessary pain in the execution of the death sentence. He noted that the prohibition against the wanton infliction of pain had come into our law from the English Bill of Rights of 1688, the identical words there

appearing in our Eighth Amendment. The due process clause of the Fourteenth Amendment would prohibit a State from executing a sentence in a cruel manner. The opinion stated: ". . . the cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely," 329 U.S. at 463-64.

In 1958 this Court disapproved the punishment of a native born citizen by impositon of denationalization for one day's desertion from military duty. In that case, *Trop v. Dulles*, 356 U.S. 86 (1958), a five to four decision, the majority rejected the punishment. However, in Chief Justice Warren's plurality opinion, he pointed out that, "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." Recognizing that the language "cruel and unusual" was not precise, the opinion further clarified the scope of Constitutional prohibitions by noting that "fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is Constitutionally suspect." Of especial importance here is Chief Justice Warren's comment:

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment–and they are forceful–the death penalty has been employed throughout our history and *in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty*. 356 U.S. at 99 (Emphasis added).

The effect of the decision in *Robinson v. California*, 370 U.S. 660 (1962), was to settle that the Eighth Amendment's ban on cruel and unusual punishment, does in fact, apply to the States through the operation of the Fourteenth Amendment. There the impermissibility of punishing one for occupying the status of a narcotic addict was established.

Six year later, this Court refused to extend the *Robinson* rationale to the crime of being intoxicated in a public place. There, in *Powell v. Texas*, 392 U.S. 514 (1968), the court distinguished the "status" of drug addiction from the situation of the individual who is intoxicated in a public place.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968) the Court, in clarifying the bases upon which capital jurors may be excused, assumed the constitutional premissibility of the death penalty.

Most recently this Court in *McGautha v. California*, 402 U.S. 183 (1971) held that the absence of standards to guide a jury's discretion in determining whether to impose the death penalty did not violate due process. In a concurring opinion, Justice Black stated explicitly what appeared to have been assumed by the remaining members of the Court; that the Eighth Amendment's prohibition of cruel and unusual punishment does not outlaw capital punishment. Mr. Justice Black succinctly observed:

> The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power. 402 U.S. at 226.

Since 1971, *Furman* is the only capital case to be decided on Eighth Amendment grounds. While the *per curiam* decision and the nine separate opinions can be read, digested and interpreted in a multitude of expansive and grandiose ways, it is clear that the Court did not there rule capital punishment *per se* violative of the Eighth Amendment, but determined that

the judgments in the cases then before the Court were to be set aside because of the arbitrariness involved in discretionary sentencing prerogatives vested in the judge or a jury. Respondent reads *Furman* as standing for a single and limited proposition, to wit: Where an unbridled discretion in sentencing authority exists (whether by judge or jury) to impose either a death sentence or a life sentence upon felons convicted of equal degrees of crime, then because of the manner (arbitrarily capriciously and discriminatorily) in which those having such power have applied it in the past, such discretion violated the Constitution of the United States, and those sentenced to death pursuant to such an arbitrary power could not be executed. Of the five concurring opinions only Justice Marshall declared that the death penalty violated the Eighth Amendment on the grounds that it was excessive, unnecessary and morally unacceptable. Justice Brennan reached the same conclusion, but on the basis that the punishment did not comport with human dignity; that the punishment could not be shown to serve its purpose any more effectively than a less drastic punishment; and that the punishment was not regarded by society as acceptable. Mr. Justice Douglas expressly declined to reach the question of whether a mandatory death penalty would otherwise be constitutional. Justices Stewart and White, in their opinions, noted that it was unnecessary in that case to reach the ultimate question of whether the infliction of the death penalty was constitutionally impermissible under the Eighth and Fourteenth Amendments under all circumstances.

The net result then is that of five justices who found lacking the statutory schemes condemned in *Furman*, only two would have held that capital punishment cannot be administered under any circumstances as a matter of constitutional law.

Contrary to Petitioners' urgings (Appendix 2 to *Jurek v. Texas*, No. 75-5394 (O.T. 1975) p.7, n. 13), we do not believe this explanation of the previous cases leaves the Court with "no coherent or intelligible principles of Eighth Amendment jurisprudence," but instead, we suggest that:

1. The Eighth Amendment prohibits unnecessary cruelty, beyond that which attends extinction of life in executing the

punishment, *Wilkerson v. Utah*, 99 U.S. 130 (1878), *In Re Kemmler*, 136 U.S. 43 (1890), *Louisiana ex rel. Francis v. Resweber* 329 U.S. 459 (1946).

2. Punishments may be imposed for acts committed, but not for occupying a status which society does not like, *Robinson v. California*, 370 U.S. 660 (1962), *Powell v. Texas*, 392 U.S. 514 (1968).

3. Those punishments permitted by North Carolina Constitution, Article XI, §1, traditional punishments of Anglo-American law, may be imposed if not grossly disproportionate to the enormity of the crime, *Weems v. United States*, 217 U.S. 349 (1909) *Trop v. Dulles*, 356 U.S. 86 (1958), *McGautha v. California*, 402 U.S. 183 (1971).

4. Where an unbridled, unfettered, ungoverned discretion exists in the hands of a sentencing authority, whether judge or jury, to choose between life and death for felons convicted of equal degrees of crime, then, because of the arbitrary and discriminatory method in which such sentencing discretion has been exercised by judges and juries in the past, felons so sentenced may not be executed, though the procedure itself is not constitutionally impermissible, *McGautha v. California*, 402 U.S. 183 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972).

5. The doctrine of *stare decisis* and the impressive weight of precedent for one hundred eighty years, weighs heavily in support of the proposition that capital punishment is not, *per se*, an impermissible punishment by virtue of the Eighth or Fourteenth Amendments to the Constitution of the United States.

> *Stare decisis*, if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of Constitutional interpretation. *Green v. United States*, 356 U.S. 165, 189-193...(Frankfurter, J. concurring).
> *Furman v. Georgia*, 408 U.S. at 428 (Powell, J. Dissenting).

As tempting as it might be to men of character, learning and strong opinions to dabble in the legislative arena, the doctrines of judicial restraint and separation of powers inherent in the very fabric of this republic require that the wisdom of decisions and the advisablility of policy as to punishments for crimes rest in legislative bodies. At bare minimum, when the punishment prescribed is neither inherently cruel nor inherently unusual in its form, nor inherently cruel and unusual and not grossly excessive as applied to the particular crime, the Court should circumspectly defer to the legislative branch.

It is apparent from the action of thirty-five state legislatures and the Congress of the United States that the death penalty, while vigorously disagreed with and copiously written against by the self proclaimed "enlightened" minority, is still widely accepted by the vast majority of the people, not only of Respondent State of North Carolina, but of the United States. Chief Justice Warren's observation of 1958 is valid today, Respondent suggests, in that the death penalty "in a day when it is still widely accepted, cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles*, 356 U.S. 86, 99.

III

THE CONSTITUTIONAL APPORTIONMENT OF POWERS AND BALANCING OF POWERS AS BETWEEN THE NATIONAL GOVERNMENT AND THE STATES AND AS BETWEEN THE JUDICIARY AND THE LEGISLATIVE BRANCHES, SHOULD NOT BE ALTERED EXCEPT BY CONSTITUTIONAL AMENDMENT.

It has been observed that John Adams saw that the federal system

> followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against their representatives; (7) the state legislatures against the Senate; (8) the electoral college against the people. Mason, *Free Government in the Making*, 140-141 (3rd Ed. 1965)

As Hamilton noted in *The Federalist* (No. 45), "The powers delegated by the proposed Constitution to the Federal government are few and defined." Mr. Chief Justice Marshall observed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819): "This government is acknowledged by all to be one of enumerated powers....We admit, as all must admit, that the powers of the (federal) government are limited, and that its limits are not to be transcended."

Mr. Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 383, 325 (1816), noted:

> The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

Aside from the limited sovereignty of the federal government, the power then lies, Respondent contends, with the people, to be utilized by the people through the states and their elected legislatures according to the intention of the Tenth Amendment to the Constitution.

This Court in *Ullman v. United States*, 350 U.S. 422, 428-429 (1956) observed:

> Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process . . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

"Construction" of a statute or Constitutional provision is not required when the provisions are positive, clear and free from all ambiguity. *Wright v. United States*, 302 U.S. 583 (1938). The Fifth Amendment expressly provides "No person shall be held to answer for a capital...crime, unless on a presentment or indictment of a grand jury,...nor shall any person be subject for the same offense to be twice put in jeopardy of life..., nor be deprived of life,...without due process of law...." In the Fourteenth Amendment, the language is "...nor shall any State deprive any person of life,...without due process of law;...."

There is no need to search for meanings beyond the Constitution, *United States v. Sprague*, 282 U.S. 716 (1931) and the Court should not, by resort to sophistication, attempt to restrict an obvious meaning. *Maxwell v. Dow*, 176 U.S. 581 (1900).

In *United States v. Sprague, supra*, 282 U.S. at 731, the Court observed:

> The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical,meaning; when the intention is clear, there is no room for construction and no excuse for interpolation or addition.

The terminology "capital punishment" carries with it the same meaning today that it carried with it at the time the Framers prepared the Constitution and the Bill of Rights – punishment by death of the criminal.[4]

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4 "capital crime, such a one as subjects the criminal to capital punishment, that is, the loss of life." II

While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words, and neither practice nor extrinsic circumstances can control its clear language. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

The Constitution is to be construed in light of its purpose and given a practical interpretation. *Smiley v. Holm*, 285 U.S. 355 (1932). As Mr. Justice Douglas put it, "The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning." *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958).

In *United States v. Classic*, 313 U.S. 299, 316 (1941), the Court said,

> Thence we read (the Constitution's) words, not as we read legislative codes, which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

It is important to note at this point that while protection from the tyranny of government was one of the purposes of

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4(continued)

> ENCYCLOPAEDIA BRITANNICA; or, A DICTIONARY OF ARTS AND SCIENCES, 1st Ed. (1771)
>
> "Capital punishment is the execution of a criminal pursuant to a sentence of death imposed by a competent court." IV ENCYCLOPAEDIA BRITANNICA (1969 Ed.).
>
> "capital, adj. . . . 14. involving the loss of life: *capital punishment.* 15. punishable by death: *a capital crime; a capital offender.*" THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged Ed. 219 (1966)

the people in establishment of a government of stated, limited and defined powers through a written Constitution, it was not and is not the only purpose. The Preamble to the Constitution lists purposes including "...To insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity...."

The Constitution, thus, was prepared and accepted to provide for checks and balances within the government and internal safeguards against tyranny by government in providing for the people a government with the means to apprehend, arrest, try and punish those criminals who would terrorize the community or criminally deprive a citizen of life, liberty or the pursuit of happiness. This Court has referred to the Preamble as evidence of the origin, scope and purpose of the Constitution. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 403 (1819); *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 470-471 (1793); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816).

Concerning the Preamble, Alexander Hamilton observed in *The Continentalist* in 1781:

> In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority to make and execute the laws with rigor, than to guard against encroachment upon the right of the community. As too much power leads to despotism, too little leads to anarchy, and both, eventually, to the ruin of the people. Quoted in Mason, *Free Government in the Making* 154 (3rd Ed. 1965).

A reading of the Constitution as it was written and adopted by the original states, including the Bill of Rights, can lead only to the conclusion that at that time, the punishment of death was a permissible punishment contemplated by the framers of the Constitution. A review of the cases and decisions by this Court over the last two hundred years discloses *no* precedent upon which to base a conclusion that capital punishment is *per se* an impermissible punishment under that Constitution.

It is a well settled doctrine of constitutional law that the burden of proof is on the one who challenges the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality, a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961). That is not to suggest that under no circumstances could the validity of legislatively authorized punishments be challenged, but Respondent contends that the proper standard for judicial review is that set out by Chief Justice Burger, dissenting in *Furman, supra,* 408 U.S. at 384:

> I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but rather that the primacy of the legislative role narrowly confines the scope of judicial inquiry whether or not proveable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.

Contrary to any legislative default, there has been apparent legislative activity to enact or re-enact some form of capital punishment on the part of thirty-five states and the Congress of the United States in the brief period since the decision of this Court in *Furman.* The issue before this Court is not the wisdom or social desirability of capital punishment; those questions are addressed appropriately to the legislative branch. Justice Exum's concurring opinion in the North Carolina Supreme Court in this case is an eloquent statement of one troubled by the wisdom of capital punishment but acknowledging legislative supremacy in matters of fixing punishments. After all, the Court's

> function is not to impose on the State, *ex cathedra,* what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures...in such cases.

McGautha v. California, 402 U.S. 183, 195-96 (Mr. Justice Harlan).

The "ordeal of judgment" (Pet. *Fowler* Reply Brief, Appendix 2 to Petitioner's Brief in *Jurek v. Texas*, at 3) to which the Petitioner would subject this Court is an illusion. Petitioners magnify the problems of whether, when, and under what circumstances a mature and progressive society should choose to assume responsibility for putting its heinous criminals to death. Petitioners assert, in effect, that it is so difficult that we can only solve the problem by defining it away. Respondent's solution is not so simplistic. But Respondent asserts its willingness to assume its constitutional responsibility for choosing who must be executed for what crimes and in what manner.

Those who decry the imposition of capital punishment first urge that modern society is revulsed by the prospect of the death penalty being imposed. The fact of re-enactment since *Furman* by so many of the states' legislatures and by the Congress refutes that notion. In California by constitutional initiative an amendment was passed by a 65% majority restoring capital punishment after challenge in the State's courts. Its passage testifies to the weakness of the charge of public unacceptability. In 107 cases North Carolina juries, though aware of the mandatory death penalty consequences of a guilty verdict, have not shirked their duty where they were convinced beyond a reasonable doubt of guilt.

A second basis on which opponents of capital punishment rest is a somewhat anti-democratic, autocratic posture: if the people only knew and understood, they would oppose capital punishment. In a democracy it is the people who govern, and while their information and education is sometimes imperfect, it is the will of the people and not the preference of a handful, which determines the standards of decency of our state and nation.

The Supreme Court of North Carolina, although divided in *State v. Waddell*, on the issue of statutory interpretation in the light of *Furman*, was unanimous that capital punishment and its imposition is constitutional under the Constitution of North Carolina and the Constitution of the United States. *State*

v. Waddell, 282 N.C. 431, 435, 194 S.E.2d 19, 22-23. In dissenting opinions in *Waddell*, Chief Justice Bobbitt and Justice Sharp (now Chief Justice) made it clear that "...There are no constitutional infirmities in capital punishment *per se*...", *Waddell, supra*, 282 N.C. at 476, 194 S.E. 2d at 47.

In Petitioners' case Chief Justice Sharp, writing for a unanimous Court, noted that the dissents in *Waddell* and companion cases

> were not based upon the premise that the death sentence constituted cruel and unusual punishment or that there were any constitutional infirmities in capital punishment *per se*.

State v. Woodson, 287 N.C. at 591-592. Justice Exum in his separate opinion, noted that

> ...as a judge, I cannot substitute my personal will for that of the legislature merely because I disagree with its chosen policy.

Woodson, supra, 287 N.C. at 600, 215 S.E.2d at 621.

In *Furman* it is made clear that were this Court invested with absolute legislative power, some would legislate the abolition of the death penalty. Respondent concedes that the Court, in an unreviewable assertion of its power, could abolish the death penalty. But Respondent urges that the decision whether to abolish, is indeed a legislative judgment, a judgment which, in light of the plain language of the Constitution can be made only by the people acting through their elected legislatures.

The Petitioners themselves, in their appeal to the history of the ban they seek to invoke, have aptly described the role they blatantly ask this Court to assume (Petitioner's *Fowler* brief at 28):

> The preamble to the Bill of Rights (of 1688) declared that James II had endeavored to "subvert" the "laws and liberties of the kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, *without the consent of parliament.* (Emphasis added).

For the Court to abolish the death penalty in the teeth of the Constitutional text is for the Court to assume the role of a super legislature – a role which ill-becomes the Court and ill-serves the Republic.

IV

ELECTED STATE LEGISLATURES MAY CONSTITUTIONALLY SELECT ANY PUNISHMENT WHICH SERVES LEGITIMATE PURPOSES AND IS ACCEPTABLE TO CONTEMPORARY SOCIETY.

The General Assembly of North Carolina, in its wisdom and through the legislative process, has reached a judgment that there is social value from the imposition of capital punishment.

After extensive debates over a period of several years in which efforts to amend, repeal or modify the death penalty in each legislative session met with varying successes and failures, the General Assembly in 1974 provided that murder in the first degree as described by statute "...shall be punished with death."

Petitioners contend that the legitimate functions of punishment must be geared toward five related but separable objectives, i. e., reformation and rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. As in our *Fowler* Brief, we generally agree. Yet, contrary to Petitioners' posture, we urge strongly that capital punishment does fulfill and reinforce vital social values which are essential to the Republic and to her citizens' confidence in government.

By providing for the death penalty, the General Assembly found that capital punishment acts as moral reinforcement or reprobation by exemplar to others; that it is the final and complete isolation of the offender in those severe cases in which the security of the people requires it; that the death penalty satisfies a pressing need for social retribution; that thereby the State demonstrates to the people its willingness to shoulder its responsibility with respect to the worsening problem of armed robberies and related murders in cold blood; and that

the death penalty, if imposed, would act as a deterrent to those who might otherwise be tempted to commit the heinous crime of first degree murder.

> (a) The death penalty has been determined, in the judgment of the General Assembly of North Carolina, to have a substantial deterrent effect.

The judgment of the General Assembly of North Carolina that capital punishment more nearly achieves the permissible goals of criminal justice than would life imprisonment is certainly not an irrational judgement nor is it inconsistent with the legitimate and constitutionally permissible aims it attempts to achieve. The determination and enactment of the best method is a legislative decision and not a judicial choice. Despite the numerous law reviews, sociological reports and statistics cited by the Petitioners purporting to show that the death penalty is no deterrent to the commission of capital crimes, Petitioners finally concede that these are not proof, but opinions, albeit in Petitioner's eye, expert. The North Carolina Supreme Court has said, and wisely Respondent urges, that: "What constitutes cruel or unusual punishment...is not subject to expert (or other) opinion evidence." *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 245 (1969).

The value of statistics and merit of statistical theories are, like the beauty of a child, most obvious to the parent. The opinions of respected persons active in the field of criminal justice are, nevertheless, worthwhile to indicate at the least a strong divergence of opinion from Petitioners' conclusion. In 1974 the Honorable Ben R. Miller, then Chairman of the American Bar Association Section of Criminal Justice, observed that:

> Contrary to many assertions that the possibility of apprehension, conviction and infliction of a death penalty cannot be 'proven' to be a stong deterrent, I submit that the F.B.I. Uniform Crime Reports for the years since 1960 conclusively substantiate the death penalty as a deterrent. There were 56 executions in 1960, 42 in 1961 and 47 in 1962. In 1963...there were but 21. Between 1963 and 1967, murder

> increased a dramatic 32%. In the same period, aggravated assault jumped over 43% and forcible rape 48%...
>
> In fact, the last execution was in 1967. In the ensuing five year period, the rate for murder jumped 46%, aggravated assault 45%, and forcible rape 62%. To one who has practiced law over forty-five years, these statistics were not necessary to establish that the death penalty for forcible rape was a very strong deterrent to the commission of that crime.
>
> Criminal Justice Bulletin, Volume 2, No. 3, Fall 1974, at 3.

Respondent shows that in North Carolina in 1974, the first year in which death penalty sentences became widely known in North Carolina, *murders decreased* by 37 or 5.87% (from 630 in 1973 to 593 in 1974); *rapes decreased* by 32 or 3.98% (from 805 in 1973 to 773 in 1974); while nationwide murder increased by 6% and rapes by 8%. Crime in North Carolina, N.C. Police Information Network Uniform Crime Reports, 1974.

Of equally scientific orientation, is the study of Professor Ehrlich originally appended to the *amicus* brief of the Solicitor General in *Fowler v. North Carolina* and subsequently printed in 65 American Economic Review 397 (1975). While Respondent does not adopt or defend all of the premises upon which Professor Ehrlich's formulae and conclusions rest, his conclusions as a sociological statistician are of equal or perhaps greater strength than those of others active in the field. Generally his conclusion as to the efficacy of the *imposition* of capital punishment as a deterrent was that for each execution actually carried out, approximately eight murders are deterred or prevented. If Professor Ehrlich's conclusions are at all credible, the deterrent value is a substantial one. For each killer actually executed, he concludes that the murder of eight innocent law-abiding victims were deterred.

The correlation between spiraling violent crime rates and the absence of an effective capital punishment, i. e., no

imposition of capital punishment in North Carolina since 1961, coupled with the statistical studies of Professor Ehrlich, presents a valid basis upon which the General Assembly made its rational decision to mandate capital punishment by statute.

> (b) The General Assembly has determined that imposition of the death penalty for the most serious of homicides, first degree murder, serves a useful social purpose as an expression of society's revulsion and as a proper channeling of retributive reaction.

The legislative judgment of the General Assembly was no doubt based upon the need for the State to express its outrage at the terrible crimes of first degree murder and to thereby express the retribution which every individual victim would feel.

Some writers have challenged retribution as a proper basis on which to base a penal statute. Respondent differs and urges that retribution is a constitutionally permissible basis for capital punishment. In the words of Mr. Justice Stewart in his concurring opinion in *Furman v. Georgia, supra,* 408 U.S. at 308:

> On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy – of self help, vigilante justice and lynch law.

The thread which ties obedience to government, co-operation with government and indeed, the consent of the governed is worn exceedingly thin by a building feeling of frustration. This helpless feeling is individually and socially

exacerbated by the fact that vicious, cold-blooded criminals who have been tried in the courts of our state under the fairest of circumstances, convicted by a jury permitted to hear only admissible evidence, and required to reach a verdict unanimously, are properly sentenced to suffer death for their heinous crimes, but they continue to evade their justly deserved punishment. This frustration is heightened when the sentences of vicious defendants, tried and convicted under the same types of circumstances, still cannot be carried out. As Justice Lake in *State v. Jarrette, supra,* 284 N.C. at 664, points out:

> The reasonable certainty or even likelihood of a punishment commensurate with the offense, imposed by the state is more likely to deter private effort by the family and friends of the victim to 'balance the account,' than is a policy of correction designed to release the offender in society as soon as possible.

It is important to note that, as England's Lord Justice Denning said:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else....The ultimate justification of any punishment...that it is the emphatic denunciation by the community of a crime; and...there are some murders which...demand the most emphatic denunciation of all, namely, the death penalty.
>
> *National Commission on Reform of Federal Criminal Laws,* two working papers, 1359 (n. 47) (1970).

(c) The goal of specific deterrence or isolation, though permanent, is a permissible punishment goal and is well served by capital punishment for first degree murder.

As to isolation of the offender, suffice it to say, that imposition of capital punishment for these types of crimes will

effectively isolate the offender from the society he has so brutually and senselessly victimized. Though permanent and irreversible, such isolation is society's appropriate response to the perpetrator of cold-blooded killings such as Petitioners perpetrated in the course of this robbery.

(d) The legislative definition of first degree murder to include murders committed in the perpetration of certain felonies is not constitutionally impermissible.

N.C. Gen. Stat. §14-17 includes within "first degree murder" those murders committed with premeditation and deliberation and those committed "in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony." "Or other felony" has been defined by our court to include felonies "inherently dangerous to life", *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975) as well as any felony "the commission or attempted commission (of which) creates any substantial foreseeable human risk and actually results in the loss of life", *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972).

Here the petitioners were part of a planned conspiracy to carry out an armed robbery, and in the course of the armed robbery the lone witness was needlessly murdered. In such a case our law is clear that each and all conspirators to such a robbery are equally guilty of murder in the first degree. *State v. Fox,* 277 N.C. 1, 175 S.E.2d 561 (1970); *State v. Hairston,* 280 N.C. 220, 185 S.E.2d 633 (1972); *State v. Wright,* 282 N.C. 364, 192 S.E.2d 818 (1972).

While Waxton was the trigger man in the robbery-murder Woodson was charged as an aider and abettor. In North Carolina one who assists another in the commission of a crime is an aider and abettor, *State v. Benton,* 276 N.C. 641, 174 S.E.2d 793 (1970), and is equally guilty with the principal. Our Court has defined "aider and abettor" in *State v. Price,* 280 N.C. 154, 184 S.E.2d 866 (1971) as follows:

> ...One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and,

> with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator....

In *State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961), the definition is stated:

> '...A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.' *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272; *State v. Johnson*, 220 N.C. 773, 776, 18 S.E.2d 358.

Here, there was evidence tending to show that the Petitioner Woodson:

1) Took part in the planning of the robbery, (R. 91);

2) Test-fired the rifle and had it in his possession in the car outside the store while the robbery-murder was in progress, (R. 45);

3) Fled the scene of the crime after hearing two gunshots, picking up Tucker and Waxton, who were carrying a cash register tray and dollar bills in their hands, (R. 45);

4) Shared equally in the proceeds of the robbery (R. 93); and,

5) Fled the State with Waxton to avoid apprehension (R. 91).

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for that purpose to the knowledge of the actual perpetrator, are principals and equally guilty. *State v. Dawson*, 281 N.C. 645, 190 S.E.2d 196 (1972); *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970). However, under the felony murder rule, the underlying felony which elevates the murder to first degree murder is merged into the first degree murder offense, *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973).

Though not in issue here, an "accidential" killing which *results from* a felony in which there was a *"substantial foreseeable human risk"* has been held in one recent case, *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972), to be first degree murder, even though, in that case, there was scant evidence of accidental homicide. In *Thompson, supra*, after the defendant had said he had "somebody upstairs...to take care of", he then shot the victim at close range, *as in the instant case*, in the back of the head.

> An interrelationship between the felony and the homicide is prerequisite to the application of the felony-murder doctrine. 40 C.J.S. Homicide §21(b), at 870; Perkins, op. cit. at 35. A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute "when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction." 40 Am. Jur. 2d Homicide §73, at 367; see 51 Dickinson Law Review 12, 18-19 (1946). Robbery cases bearing on this point are *Campbell v. State*, 227 So. 2d 873, 878 (Fla. 1969); *State v. Glenn*, 429 S.W. 2d 225, 231 (Mo. 1968); *Jones v. State*, 220 Ga. 899, 142 S.E. 2d 801 (1965); *Commonwealth v. Dellelo*, 349 Mass. 525, 529-31, 209 N.E. 2d 303, 306-07 (1965); *People v. Mitchell*, 61 Cal. 2d 353, 360-62, 38 Cal. Rptr. 726, 731, 392 P. 2d 526, 531-32 (1964).
> *State v. Thompson, supra*, 280 N.C. at 212.

Petitioners criticize the felony-murder rule as contradictory and unpredictable (Petitioners' Brief at 34), citing the *Carey* cases. Petitioners opine that the fates of Albert and Anthony Carey, Dorsey, Givens and Mitchell are "utterly mystifying" (Pet. Brief 40) and that Albert Carey's death sentence is cruel and unusual. Respondent shows unto the Court the answer to the "mystery". The Carey brothers and one Dorsey instigated, planned and engineered a series of armed robberies in which they obtained a fifteen year old youth, "Peanut" Mitchell, and Harold Givens, to actually go in and carry out the armed robberies. In the course of one of these a victim was murdered. Evidence against Mitchell was by an eyewitness, a fingerprint at the scene and a confession. The State had insufficient evidence to try and convict the Carey brothers, Givens and Dorsey; but for the testimony of Mitchell, Givens, the Careys and Dorsey would go free. In light of these facts, the District Attorney made a plea bargain with Mitchell. In the plea bargain Mitchell was sentenced to thirty years imprisonment for second degree murder and agreed to testify for the State against the Careys.

At trial he testified against Anthony Carey, who was convicted. After being confined with the Careys, Mitchell repudiated his testimony in the trial of Givens, and the State was non-suited. He reaffirmed his original testimony in the first trial of Albert Carey who was convicted. The two *Carey* cases were reversed by the Supreme Court of North Carolina. In the interim, Mitchell was confined in the North Carolina Department of Corrections, and while there decided to refuse to cooperate in either Carey case or against Dorsey.

In the second trial of Anthony Carey, Mitchell again repudiated his testimony, but was called and examined at length as a hostile witness by the State. As a result, Albert Carey was convicted at the December 16, 1974 term of Superior Court. As result of Mitchell's refusal to testify, the charges against Anthony Carey and Antonio Dorsey were dismissed by the District Attorney on December 19, 1974. The Supreme Court of North Carolina affirmed the result of the second trial on October 7, 1975. See *State v. Albert Carey*, 288 N.C. 254, _____ S.E. 2d _____ (1975). Respondent submits that Albert Carey's fate was no more mysterious than the fates of others who are caught and convicted, while their colleagues in crime go unapprehended.

Respondent contends that the felony-murder rule results are quite predictable. When the State has insufficient credible evidence to prove offenses beyond a reasonable doubt, there are no convictions regardless of the apparent crime. Likewise, it is altogether predictable and foreseeable that someone will be killed, or at least injured when robberies are carried out by armed persons. The presence of a deadly weapon in the hands of one defendant carrying out an armed robbery gives ample warning to his co-defendants that an innocent victim is likely to be killed. In the instant case the killing was not the result of resistance or non-compliance of the victim, but was in the nature of a witness execution by a single shot into the head at close range (R. 44).

Respondent sees no constitutional flaw in this statutory rule of substantive criminal law. As Petitioners say in their brief, the difference between a premeditated first degree murder and a felony-murder first degree murder is "of no constitutional significance" (Pet. Brief at 30).

V

THE EXERCISE OF HUMAN JUDGEMENTS, IN GOOD FAITH, PURSUANT TO THE OBLIGATIONS OF THE CONSTITUTION, STATUTES AND OATHS OF OFFICE BY PROSECUTORS, JURORS, JUDGES AND THE GOVERNOR ARE NOT VIOLATIVE OF THE EIGHTH AMENDMENT.

It is important to recognize that all of the exercises of judgment complained of by Petitioners are required by the Constitution of the United States or the Constitution of North Carolina or by statutes and oaths of office taken by the officers complained of. None are innovations; none have the effect of diminishing the myriad rights of the accused–indeed, each exercise of judgment can only operate, if at all, to benefit an individual defendant.

Petitioners ask rhetorically (Pet. Brief at 54) whose judgment says that these two petitioners should be executed, and then profess that there is no answer. On the contrary, Respondent says that there clearly is an answer. The judgments of the General Assembly of North Carolina, representatively

and responsively elected, a duly constituted Grand Jury of defendants' peers, a skilled, vigorous and effective prosecutor, a fairly chosen representative petit jury, a well educated and circumspect trial judge, and the unanimous judgment of the North Carolina Supreme Court acting to effect enforcement of a specific grant of legislative power to impose the death penalty for certain heinous crimes, Article XI, § § 1 and 2, North Carolina Constitution. Actually petitioners' complaint is not that they do not know whose judgment is responsible but that they disagree with the decisions made by these public authorities. The fact that this disagreement may exist and be joined in by an appreciable segment of society raises no constitutional infirmity.

The exercise of this type of judgment is required if our present system of criminal justice is to survive. Petitioners know that and in answer urge that capital punishment is somehow different, constitutionally requiring an absolutely judgment-free guilt determination process. Such a judgment-free system is alien to our jury system and is neither constitutionally required nor possible where mere mortals are charged with dispensing justice. The protections of the due process clause of the Fourteenth Amendment apply with equal force to deprivations of life and deprivations of liberty. There is no basis in constitutional law for assuming the necessity for a different system of justice to meet due process requirements as to "life" from that necessary for the due process protections for "liberty".

None of the exercises of judgment complained of occur after the verdict, except for the Governor's executive clemency power to "pardon, commute or reprieve". None of the actions complained of affect sentencing as such, and all are simply a human judgment as to whether a certain crime, first degree murder, as described by our statutes has in fact been committed, and whether, with admissible evidence, the State can prove beyond a reasonable doubt the commission of that crime to a jury.

As emphasized in Respondent's *Fowler* brief at 38, there is a material difference between the judgments of public officials doing their constitutional duties and the free-wheeling discretion which Petitioner seeks to impute to Respondent's

officials. (Respondent's *Fowler* Brief, p. 38, nn. 50 and 51).

> (a) The prosecutor, in evaluating his cases and his chances of conviction success, and in plea bargaining to strengthen his changes of conviction, is acting consistently with his constitutional duty and his oath of office.

For the criminal to ever be prosecuted, charging decisions must be made by someone. In our system the elected District Attorney (solicitor) has that responsibility. His constitutional duty is to "be responsible for the prosecution of all criminal actions in the Superior Courts of (his) district," North Carolina Constitution Article IV, §18(1). His oath of office requires that he "in the execution of his office, endeavor to have the criminal laws fairly and impartially administered, so far as in (him) lies, according to the best of (his) knowledge and ability . . . ." N.C. Gen. Stat. §11-11. The District Attorney has been spoken of as "the right arm" of the court, *State v. McAfee*, 189 N.C. 320, 127 S.E. 204 (1925). In taking office the District Attorney must also take an oath to uphold the Constitution of the United States as well as the Constitution of North Carolina before entering upon his duties. It is a criminal offense for him to wilfully or intentionally neglect to perform the duties of his office according to law, N.C. Gen. Stat. §14-230. Further, in the absence of evidence to the contrary, the acts of public officers are presumed to have been properly performed. *Lewis v. United States*, 279 U.S. 63 (1929). A District Attorney, then, is presumed to have exercised his judgment in good faith, and to have discharged his duty according to law. *United States v. Gleason*, 265 F. Supp. 880 (S.D. N.Y. 1967).

The District Attorney has a duty then to prosecute those whom he, in good faith, believes to be guilty and whom he believes can be convicted on the available evidence. He is responsible for criminal prosecutions, and has the burden of declining to charge a citizen unless he legitimately believes the individual is guilty of the offense charged and can be convicted.

He does his duty in good faith, relying on his knowledge of the law, his education, training and experience as a lawyer and prosecutor. His decision comes as a result of a solemn but

human evaluation which cannot be eliminated from the criminal justice process. *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

The reviewability of the prosecutor's discretion has been recently recognized, *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). His abuse of discretion is potentially subject to judicial remedy. *Comment*, 9 Harv. Civ. Rights-Civ. Lib. Rev. 372, 395-7 (1974).

Part and parcel of the District Attorney's evaluation of the strengths and weaknesses of his charging options is the necessity to face situations in which he has several co-defendants, equally guilty as a matter of law, but has insufficient evidence to convict any. In that case he is permitted, and, perhaps, required by the exigency of the situation to exercise his best judgment consistent with his oath of office and constitutional responsibilities to plea bargain with the lesser criminal in order to obtain evidence sufficient to convict the prime mover in the crime. Respondent submits that nothing in the case law or statutes of North Carolina, or in the Eighth or Fourteenth Amendments require a District Attorney to sit idly by while all or all but one of a group of equally guilty murderers go unconvicted, when he can, by means of a plea bargain with one defendant, obtain sufficient credible evidence upon which to convict all the others.

The prosecutor's practice of striking a bargain with a lesser culprit in order to obtain otherwise unobtainable, but vital evidence for the conviction of a greater culprit is an essential part of the prosecutor's function. It is a function well respected by those familiar with the problems of prosecuting and convicting cases involving multiple defendants and murdered witnesses. The American Bar Association's Minimum Standards for the Administration of Justice approve such practice, *A.B.A. Standards Relating to the Administration of Criminal Justice*, "Pleas of guilty", §1.8 (a)(v).

This is precisely what happened in Petitioners' cases, though they stand on somewhat different footings. The difference in the Petitioners' separate factual situations has been somewhat blurred in the copious representations in their behalf. Only petitioner Waxton, who was the prime mover and trigger

man, sought to enter a plea of guilty to lesser offenses at the close of the State's evidence.

Petitioner Woodson's attorney apparently had entered into pretrial plea negotiations and had indicated to the District Attorney that he would make pleading recommendations to his client, Woodson (R. 70-71). Woodson consistently declined to enter or tender any plea to any charge and elected, as was his constitutional privilege, to be tried by a jury on the charges of which he was accused.

Petitioner Waxton, on the other hand, did attempt to tender a plea to the lesser offenses of armed robbery and accessory after the fact to murder after the State had rested its case and he could perceive the depth of his difficulties. Waxton's offer was only to plead to the lesser offense which Tucker, a State's witness, had been permitted to plead to, but nothing more. The evidence appears to indicate that Tucker was not armed, but that only Waxton, who had a pistol, and Woodson, who had a rifle outside, were actually carrying deadly weapons.

Respondent does not dispute the legal premise that under the felony murder rule all four were equally guilty, as Petitioners suggest, as a matter of law. *State v. Bush*, 287 N.C. 159, _____ S.E.2d_____(1976).

Petitioners appear to contend that it was fundamentally unfair to permit the two unarmed, younger and less criminally experienced co-defendants to plead to lesser charges in exchange for their vital testimony against petitioners Woodson and Waxton. As Chief Justice Sharp points out in the opinion below, 287 N.C. at 593 215 S.E.2d at 616:

> From the earliest times, it has been found necessary for the detection and punishment of crime, for the State to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations, by making criminals suspicious of each other, and it often

leads to the punishment of guilty persons who would otherwise escape. Therefore, on the ground of public policy it has been uniformly held that a state may contract with the criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not. (Citations omitted) . . .

In many states the prosecuting attorney has no authority without the Court's consent, to make a binding agreement with one charged with a crime that if he will testify against others he himself shall be exempt from criminal liability or be allowed to plead guilty to a lesser offense. 'In states in which a prosecuting attorney may enter a *nolle prosequi* without the consent of the court, he may grant a witness immunity from prosecution by contract without approval of the court.' . . . (Citations omitted) . . . The courts treat such promises as pledges of the public faith and, when made by the public prosecutor, the court will see that the public faith which has been pledged by him is kept.

In North Carolina, the District Attorney, or Solicitor as he was known, is a Constitutional officer authorized and empowered to represent the State. He acted fully within his authority under state law when he entered the agreement which he made with Tucker and Carroll for truthful testimony. Our courts have approved plea bargaining as an essential part of our system of criminal justice. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

In Mr. Justice White's opinion in *Brady v. United States*, 397 U.S. 742 (1970), this Court noted that: "We cannot hold that it is unconstitutional for the state to extend the benefit to a defendant who in turn extends a substantial benefit to the state . . . ." Likewise our court held that there is no merit to a defendant's claim of denial of due process because the District Attorney had the absolute authority to charge and prosecute for a capital offense, or to bring an accused to trial upon a lesser offense, *State v. Bush, supra.*, 289 N.C. at 165, ____S.E.2d____ (1976).

In the analagous area of sentence concessions, Mr. Justice Roberts noted for the Court in *Lisenba v. California*, 314 U.S. 219, 227 (1941) that

> the practice of taking into consideration, in sentencing an accomplice, his aid to the state in turning state's evidence can be no denial of due process to a convicted confederate.

In 1967 the Court of Appeals for the District of Columbia Circuit in *Newman v. United States*, 382 F.2d 479 (1967), faced the question of whether there was a denial of an appellant's Constitutional rights when, in a non-capital case, the United States Attorney agreed to accept a guilty plea tendered by an appellant co-defendant for a lesser included offense while refusing to accept the same plea from the appellant. Chief Justice Burger, then a Circuit Judge, pointed out that the United States Attorney has an obligation for the faithful execution of the laws and prosecution of offenses against the United States – an obligation, Respondent suggests, similar to the Constitutional and statutory burden imposed upon the elected state District Attorney in the instant case.

> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate (to) him an impossible task; of course this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty, or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other old, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any discretion to inquire into or review his decision. *Newman v. United States, supra.*, 382 F. 2d at 481-482.

This Court has held that mere selectivity in prosecution creates no Constitutional problems, *Oyler v. Boles*, 368 U.S. 448, 456 (1962). To invoke as a defense the denial of due process under the Fourteenth Amendment one must prove that the selection was "deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification," *United States v. Steel*, 461 F.2d 1148, 1151 (9th Cir. 1972).

As pointed out by Chief Justice Sharp below, Petitioner Waxton had none of the traditionally accepted mitigating factors lessening the extent or nature of his participation. The evidence discloses that he was the moving party, the oldest of the defendants, the most experienced participant and the perpetrator of the killing. Brutally and without provocation, he fired the shots which killed Mrs. Butler. He also wounded Mr. Stancil.

Petitioner Woodson at no time tendered a plea and cannot then complain that his plea was not accepted. He apparently contended that he was innocent, under the theory that his actions had been under the duress and coercion of the Petitioner Waxton. The trial judge instructed the jury on coercion as an excuse for crime (R. 138-139). Had the jury believed that he had, in fact, been coerced or that he was acting under duress, they would have acquitted him.

> (b) The judgment exercised by jurors individually and collectively in a criminal case is permissible and required by the Constitution.

Respondent submits that much of what petitioners complain about is inherent in the Anglo-American system of criminal justice as it has developed to protect the rights of accused persons.

The right to a jury trial is guaranteed to every accused person. Article I, §24, Constitution of North Carolina guarantees the right of jury trial to all criminal defendants and requires unanimous jury verdicts. The Sixth Amendment further guarantees the right to jury trial in state courts, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

The phenomenon of jury nullification has been recognized since the colonial days of America as a deterrent against the arbitrary exercise of judicial power. IV Pound, JURISPRUDENCE §§ 115-116 (1959).

> The phenonenon survives *not as an act of discretion*, but as a call of high conscience . . . an act in contravention of the established instructions. This requirement of independent jury conception confines the happening of the lawless jury to the *occasional instance* that does not violate, and viewed as an exception, may even enhance the overall normative effect of the rule of law. *United States v. Dougherty*, 473 F.2d 1113, 1136-1137 (D.C. Cir. 1972) (Emphasis added).

The function of jurors should be presumed to be in response to their sworn duty – that they will "truthfully and without prejudice and partiality try all issues . . . and render true verdicts according to the evidence," N.C. Gen. Stat. §9-14. Efforts before this Court to limit the exercise of jury discretion or judgment have failed. In *Winston v. United States*, 172 U.S. 303 (1898), this Court noted that an attempt to limit jury discretion in a capital case was impermissible. Mr. Justice Harlan, for the Court in *McGautha v. California* concluded:

> we find it quite impossible to say that committing to the untrammeled discretion of the jury, the power to pronounce life or death in capital cases is offensive to anything in the Constitution. *quoted* in 408 U.S. at 427 (Powell, J. dissenting).

The underlying assumption upon which *McGautha* was based is important and relevant; the assumption is that juries routinely "will act with due regard for the consequences of their decision . . . ." 408 U.S. at 387-388 (Burger C. J. dissenting).

The theory of systematic jury nullification in a mandatory sentence statute situation, in order to be credible, requires that one assume that only a few defendants accused of first degree murder are ever convicted of the capital charge. The fact is that in the two and one-half years since the *Waddell*

decision, the death row population has grown to 107, indicating dramatically that juries are not swerving from their sworn duty to render true verdicts according to the evidence and the applicable law.

A second assumption one must make in order to accept the theory of wide spread jury nullification is that jurors lightly regard their oaths, that they disregard the law as given by the judge and that they are in fact nothing more than a vehicle for bias, prejudice, and partiality.

Clearly where men and women of conscience, serving under oath, knowing the gravity of their decision, make up the jury there can be no systematized or arbitrary variance from true verdicts required by law and the North Carolina Constitution.

Petitioners point to the infrequent impositions of death sentences. Respondent urges that something greater than mere paucity of death penalty verdicts must be shown in support thereof.

Petitioners seem to say that there must of necessity be arbitrariness and invidious discrimination because so few, relatively speaking, are finally convicted and sentenced to death. Petitioners' suggestion that a relatively small number, in and of itself, raises a presumption of invidious arbitrariness is without merit. After all, this Court grants review in only approximately 1% of the cases in which appeals and petitions for review are filed.[5]

> (c) There is no constitutional infirmity in the jury's being informed that the consequences of a guilty verdict for first degree murder is the death penalty, with no jury option for sentence recommendation.

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5 *The Supreme Court, 1973 Term*, 88 Harvard L. Rev. 41, 277 (1974), *The Supreme Court, 1974 Term*, 89 Harvard L. Rev. 47, 278 (1975)

The general rule in North Carolina is that the trial judge has the sole responsibility for rendering judgments upon jury verdicts within the limits prescribed by statute.

> The sole responsibility of the jury is to decide the guilt or innocence without being hindered by the quantum of punishment possible, probable or certain upon conviction. *State v. Davis*, 238 N.C. 252, 77 S.E.2d 630 (1953).

Exceptions to this general rule are allowed only for "compelling reasons".

> Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts. *State v. Britt*, 285 N.C. 256, 272, 204 S.E.2d 817 (1974).

In the *Britt* case, during *voir dire* a juror asked about the punishment, manifesting his opposition to capital punishment. When the verdict was first returned, the jury attempted to give an impermissible verdict, "First degree murder, with mercy." There was clearly demonstrated a need to tell the jury that the old practice which permitted recommendations was no longer permissible and that the mandatory punishment was death.

Amplifying the *Britt* holding, our State Supreme Court held in three subsequent cases, *State v. Anthony Carey*, 285 N.C. 497, 206 S.E.2d 213 (1974), *State v. Albert Carey*, 285 N.C. 509, 206 S.E.2d 222 (1974), and *State v. Bell*, 287 N.C. 248, 21 S.E.2d 53 (1975), that it was error for a trial judge to refuse to permit counsel, during jury selection *voir dire*, to advise prospective jurors that death was the mandatory penalty for first degree murder and to inquire about their attitudes toward capital punishment.

To clarify the *Britt* restriction on penalty information being furnished to capital jurors, the General Assembly enacted N.C. Gen. Stat. §15-176.3, §15-176.4 and §15-176.5, which provide that either party "may inform" prospective jurors during jury selection, that *upon request* the court "shall instruct" the jury as to penalty, and that either party in its argument "may indicate" the penalty.

These statutes are consistent with the *Britt* decision's language:

> Such an argument to the jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged .... He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. See, *State v. Banner*, 149 N.C. 519, 526, 63 S.E. 84. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.
>
> *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974), did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather *Dillard* stands for the proposition that counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty. *State v. Britt, supra.*, 285 N.C. at 273.

The purpose of the legislation following the Court's decision in *Britt* was to clarify what counsel could properly

inquire about and argue to the jury. The General Assembly thereby recognized that "compelling reasons" must include the necessity that the jury know clearly, and not be misled as to their lack of sentencing discretion since the *Furman* decision. The gravity of the case and possible penalty requires that juries not be misinformed or confused as to any aspect of the law.

> (d) The trial judge's action in submitting lesser included offenses to the jury where the evidence warrants their submission is not violative of the Constitution.

Contrary to petitioners' assertion, the trial judge does not submit to the jury lesser included offenses as possible verdicts according to his personal whim or caprice. He is, however required to tailor the possible verdicts to the evidence before the jury. In borderline cases, doubt on the question of submitting lesser offenses is resolved in favor of the defendant. *State v. Vestal*, 283 N.C. 249, 252, 195 S.E.2d 297 (1973).

It is clear that a defendant is not entitled to a lesser included offense instruction unless there is some evidence that would support a conviction of that charge. *United States v. Bishop*, 412 U.S. 346, 361 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965).

Respondent here incorporates by reference the portions of its *Fowler* brief (pages 36-38) which illustrate the bounds within which lesser included offenses may be submitted to a jury.

With respect to petitioners' speculation that juries might return verdicts of acquittal of more serious offenses and guilty of a lesser offense of which there is no substantial evidence of guilt, our Court has said:

> The defendant, however, cannot complain that 'the jury, by an act of grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do ... since they are favorable to the accused, it is settled law that they will not be disturbed.' *State v. Bentley*, 223

N.C. 563, 27 S.E.2d 738; *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840; *State v. Matthews*, 231 N.C. 617, 58 S.E.2d 625; . . *State v. Robertson*, 210 N.C. 266, 186 S.E. 247. See also *State v. Mitchner*, 256 N.C. 620, 124 S.E.2d 831. *State v. Stephens*, 244 N.C. 380 (1956), quoted in *State v. Vestal*, 283 N.C. 249, 252, 195 S.E. 2d 297 (1973)

Respondent argues that such verdicts are rare, occurring only infrequently, and are not the product of any sort of arbitrary or capricious exercise of discretion such as might have been forbidden by *Furman*. To be sure, the recipient of the "grace" of an errant jury cannot complain. In the absence of evidence of a pattern of discrimination, one who is among the great many convicted of the more serious offense on competent evidence should not be able to complain. The State tolerates the unsupported lesser verdict, just as it occasionally witnesses a clearly guilty accused go free because of a renegade jury's inability or unwillingness to convict, because it has no other choice.

The jury system, like democracy, is not perfect, but it is the best system of criminal justice yet devised by men. Its failings are structured to protect the accused. That all capital defendants are not the recipients of unsupported verdicts of lesser included offenses is not a constitutional hand-hold for those properly convicted of a capital crime.

(e) The exercise of executive clemency by the Governor is properly an unfettered, independent and judicially unreviewable act of mercy.

The discretion vested in the Governor of the State of North Carolina by the Constitution of North Carolina, in Article III, Section 5(6), is the authority to grant a reprieve, to commute a death sentence imposed upon any defendant or to grant to such defendant an absolute pardon, and to refuse to disturb such sentence imposed upon a different defendant. This authority is the exclusive prerogative of the Governor, *State v. Lewis*, 226 N.C. 249 37S.E.2d 691(1946). It is very similar to the powers conferred upon the President of the

United States by Article II, Section 2(1.) of the Constitution of the United States.

This Court in, *Schick v. Reed*, 419 U.S. 256, (1974) held that executive clemency on the national level was properly unfettered. That result applies with equal fervor to the power of a State's chief executive to constitutionally grant clemency as an unfettered excerise of mercy. This traditional power has existed and has been exercised by the Governors of every state, and by the President of the United States, since the beginning of the Republic.

The Constitution's framers sought to make executive clemency a matter of mercy unrestricted. Hamilton observed in *Federalist* No. 74:

> Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The Criminal Code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. *The Federalist*, Wright Ed. 473 (1961).

The Governor's function, in his exercise of constitutionally granted power is to review, just as the appellate courts review the trial court's rulings as to evidence and questions of law, the verdicts and judgments of the criminal justice system. The independent exercise by a Governor of his clemency judgment cannot be called freakish or arbitrary merely because another governor might have reached different conclusions.

(f) That all persons tried for first degree murder under North Carolina law are not convicted and sentenced to death does not invalidate the death penalty.

The traditional legislative arguments against the death penalty decry the excessive loss of life. However, here, petitioners have approached the death penalty on the basis that the punishment of death is now constitutionally suspect

because, they think, too few are executed or slated for execution in the normal operation of our mandatory death penalty statute. Petitioners equate the careful selectivity inherent in the operation of our jury system, with an arbitrariness which they impute obliquely to the racism of a day gone by. Logically, their conclusions do not follow, and factually racism does not exist in our criminal justice system. In the words of Chief Justice Burger, dissenting in *Furman*, 408 U.S. at 388-89:

> . . .(T)o assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

The essence of petitioners' contentions is that even under a mandatory death sentence statute there is inherent in the system, which guaranteed them a fair trial and a unanimous jury verdict, such fatal flaws of discretion and human judgment that the death penalty cannot be constitutionally implemented. Respondent disputes this contention and urges that each of the steps taken in the trial were either required by the Constitution or clearly permitted by it and are inherent in our traditional system of jury trials.

Petitioners' argument, if at all well founded – and Respondent urges it is not – would apply with equal force and persuasion to the punishments of life imprisonment, to imprisonment for a term of years, and then to any imprisonment at all.

The mandate of the Eighth Amendment, even as interpreted by the majority in *Furman v. Georgia*, does not contemplate or require that human judgment of the type complained of here should be forbidden in capital cases.

Respondent here incorporates by reference from its *Fowler* brief its discussion (pages 22-33) directed to Petitioners' contentions that the *mere existence* of the judgmental powers of the prosecutor, jury, judge and governor are sufficient, without more, to invalidate Respondent's statutes mandating capital punishment.

VI

THE ASSERTION THAT AN ENLIGHTENED AND MODERN PUBLIC OPINION HAS OVERWHELMINGLY REPUDIATED CAPITAL PUNISHMENT AS EXCESSIVELY CRUEL IS WITHOUT SUPPORT.

The Court, even before *Furman*, had accorded the Eighth Amendment's "cruel and unusual punishments" clause a level of flexibility in that it is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S.349, 378 (1909) and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

> Nevertheless the court up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the court suggested judicially manageable criteria for measuring such a shift in moral consensus . . .
>
> The Court's quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. *Furman v. Georgia*, 408 U.S. at 383 (Burger, C. J., dissenting).

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless 'it shocks the conscience and sense of justice of the people. *Furman*, 408 U.S. at 360 (Opinion of Marshall, J.).

Mr. Justice Marshall further noted, *Id.*, that

> whether or not a punishment is cruel and unusual depends, not on whether its mere mention

> "shocks the conscience and sense of justice of the people", but on "whether people who are fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."

But, to require such an "informed opinion" would substitute and create a judicial autocracy on the theory that mere elected legislators in a state in which capital punishment's diminution or abolition has been debated in every session of the General Assembly since 1950 are not informed.

In order to achieve the result which Petitioners would urge, and in order for their factual premises to be correct, i.e., that an enlightened and modern public opinion has repudiated capital punishment, one must necessarily define "enlightened" in a jocular sense, as being confined to "those who agree with me". While admittedly in North Carolina, there is a vigorous minority of the populace who disapprove of the imposition of capital punishment, their efforts have been properly directed to the legislative arena, and it is there that they have suffered repeated defeats in their efforts to totally abolish capital punishment.

Public opinion surveys, for what they are worth, and Respondent does not urge them as totally authoritative, tend to support the thesis that the public accepts and recognizes the necessity of capital punishment for the most heinous of crimes by a ratio of roughly two to one. See S. Rep. No. 93 - 721, 93rd Congress, Second Session, 13-14 (Reprinting polls). See for example the Illinois experience, where voters disapproved abolition of capital punishment by a 64.3% vote. California voters, when faced with the question of reinstatement of the death penalty, approved by a better than two thirds majority, see Amicus brief of California in *Fowler* at 37-38.

As Mr. Justice Marshall said in *Furman*, 408 U.S. at 360, quoting from *United States v. Rosenberg*, 195 F.2d 583, 608 (2nd Cir. 1952), *cert. denied*, 344 U.S. 838 (1952):

> Judge Frank once noted . . . "before it reduces a sentence as 'cruel and unusual', (a court) must have reasonably good assurances that the sentence offends the 'common conscience'. And in any context, such a standard–the community's attitude–is usually an unknowable. It resembles a slithery shadow, since one can seldom learn at all accurately, what the community, or a majority, actually feels. Even a carefully taken 'public opinion poll' would be inconclusive in a case like this."

Contemporary standards of decency may to some extent be determined by reference to legislative judgments of the people's chosen representatives and the jury's response to the question of capital punishment.

"The assessment of popular opinion is essentially a legislative, not a judicial, function." 408 U.S. at 443 (Burger, C. J. dissenting).

> . . .(T)he primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not proveable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default. 408 U.S. at 384 (Burger, C. J. dissenting).

There is no evidence of legislative default. That there have been no executions actually carried out in recent years is attributable, in part, to the fact that there are before this Court petitions for writs of certiorari in every death case affirmed by the North Carolina Supreme Court. There are, of course, stays of execution issued by our court pending the outcome, first of *Fowler*, and now, the Petitioners' cases. Likewise, the impact of *Furman* and legislative reenactments have cancelled some death sentences. Other cases since then have progressed through meticulous state court appellate review and now are here on petition for writ of certiorari.

At the trial level it may be fair to say, as petitioners do, that the death penalty is not frequently imposed, when

compared to the number of reported homicides, though there are 107 valid death sentences now outstanding in North Carolina.

> To be sure, the penalty of death is infrequently imposed An entirely valid inference from this bare fact would be, not that the society had repudiated the death penalty, but that it wishes to preserve its use to a small number of cases. A reluctance to impose a penalty is not necessarily the same as its repudiation. Polsby, "The Death of Capital Punishment? *Furman v. Georgia*," 1972 Sup. Ct. Rev. 24.

Respondent earnestly contends that the public has not repudiated the death penalty as a legitimate punitive sanction for serious, grievious crimes such as first degree murder.

VII

THE DOCTRINE OF JUDICIAL RESTRAINT REQUIRES THAT THE COURT DEFER TO THE LEGISLATIVE BRANCH THE QUESTION OF THE WISDOM OF CAPITAL PUNISHMENT.

In the words of Mr. Justice Frankfurter dissenting in *Trop v. Dulles, supra*, 356 U.S. at 128:

> The power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment.

Later in the same opinion Mr. Justice Frankfurter noted, 356 U.S. at 119-120, quoted in 408 U.S. at 432-433 (Powell, J. dissenting):

> What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation . . . . In making this determination the court sits in judgment on the

> action of a coordinate branch of the government by keeping unto itself–as it must under our Constitutional system–the final determination of its own power to act . . . . It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this court to pronounce policy. It must observe a fastidious regard for limitation on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive branch do.

There are basically three overwhelming arguments in favor of judicial restraint in these cases. First, the court lacks the authority to substitute its judgment for that of thirty-five state legislatures and the Congress of the United States on an issue so peculiarly legislative in nature. Petitioners' arguments are extensive, thought-provoking and at times eloquent, but they are arguments properly directed to legislative bodies.

> This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the legislative branch and beyond the power and competency of this court. 408 U.S. at 458 (Powell, J. dissenting).

> The most expansive reading of the leading constitutional cases does not remotely suggest that this court has been granted a roving commission, either by the founding fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of the court. 408 U.S. at 467 (Rehnquist, J. dissenting).

Second, the Court has the power to effect its views, and its decisions are parctically beyond review. There is no reviewing appellate forum. The only safeguard against the Court's implementation of its own desires or notions of what is best is the Court itself.

> The admonition of Mr. Justice Stone dissenting in *United States v. Butler* must be constantly borne in mind:
>
> > While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. 297 U.S. 1, 78-79 . . . (1936). 408 U.S. at 467 (Rehnquist, J. dissenting).

Third, the irreversibility and permanence of this Court's decision, if it be adverse to the statutory schemes of capital punishment before the Court today, effectively bars reconsideration of that decision in the near future, even if the Court subsequently were to recognize the error of its ways.

> The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment, the enduring merit of legislative action in its responsiveness to the democratic process, and to revision and change: mistaken judgments may be corrected and refinements perfected. 408 US at 462 (Powell, J. dissenting).

Respondent urges that Mr. Justice Holmes was correct in his assessment that the review of legislative choices is ". . . the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (separate opinion).

Respondent likewise urges that, for this court especially,

> The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits. 408 U.S. at 405 (Burger, C. J., dissenting).

CONCLUSION

It is important that the Court recall how this case came to be here. Petitioners committed a needless, senseless brutal murder in the course of an unresisted armed robbery of a convenience store of about $280.00. As Mr. Justice Marshall observed in his *Furman* opinion, 408 U.S. at 315:

> The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized.

Likewise, as Mr. Justice Blackmun observed in his dissent in *Furman*, 408 U.S. at 414:

> . . .(T)hese cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

Roscoe Pound in III *JURISPRUDENCE* §92, p.264, (1959), notes that "Criminal law is the primary resource of legal order for securing social interests immediately as such."

Respondent urges that acceptance of Petitioners' arguments would have the effect of disabling the states in protection of society from crime. The use of federal judicial power in derogation of a valid social interest was soundly condemned by Mr. Justice Jackson in his dissent in *Ashcraft v. Tennessee*, 322 U.S. 143, 174 (1944). The potential tragedy, Respondent urges, is that

> . . . judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. The due process and equal protection clauses of the Fourteenth Amendment were never intended to destroy the states' power to govern themselves. Black, J. in *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970).

Respondent contends that this Honorable Court has the same responsibility under the Constitution to protect the public interests of the State of North Carolina in the exercise of its retained sovereign rights that it has to protect any other constitutionally protected right, whether it be guaranteed to an individual or to a State.

In this respect, judicial modification of established, precedent-hardened constitutional law permitting the imposition of capital punishment through the use of "contemporary standards" is no more permissible or appropriate than it would be, using the same guise of "contemporary standards", to deprive an individual of his Fifth Amendment right not to incriminate himself or his Sixth Amendment right to trial by a jury.

Petitioners here complain of the mere existence of the authority of public officials to make judgments, not any denial of equal protection occasioned by any asserted abuse, real or imagined.

As Justice Powell said in dissent in *Furman*, 408 U.S. at 433-434:

> The due process clause of the Fourteenth Amendment imposes on the judiciary a similar obligation to scrutinize state legislation, but the proper exercise of that constitutional obligation . . . (requires) a full recognition of the several considerations set forth above – the affirmative references to capital punishment in the Constitution, the prevailing precedents of this Court, the limitations on the exercise of our power imposed by tested principles of judicial self-restraint, and the duty to avoid encroachment on the powers conferred upon state and federal legislatures. In the face of these considerations only the most conclusive of objective demonstrations could warrant this Court in holding capital punishment *per se* unconstitutional.

Respondent urges that both questions phrased in its Brief should be answered clearly, emphatically and definitively, "No".

Respondent contends that capital punishment, as provided for under North Carolina law, does not violate either the Eighth Amendment or the Fourteenth Amendment, and that the judgments of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; that I have served copies of the within BRIEF FOR RESPONDENT by depositing three copies of same in the United States Mails at Raleigh, North Carolina, addressed to: Jack Greenberg, 10 Columbus Circle, New York, 10019; Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305; Adam Stein, Chambers, Stein, Ferguson & Lanning, 157 East Rosemary Street, Chapel Hill, North Carolina 27514; Edward H. McCormick, Post Office Box 38, Lillington, North Carolina 27546; and W. A. Johnson, Post Office Box 146, Lillington, North Carolina 27546; *first class postage prepaid.*

This the 25th day of March, 1976.

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